[ASSIZE COURT]

1953 *Present :* **Gratiaen J.**

THE QUEEN *v.* M. SATHASIVAM

S. C. No. 1, Western Circuit—M. C. Colombo South, 38,682

Criminal Procedure Code—Section 233—Meaning of words " all statements "—Not limited to unsworn statements—Sections 160, 161 (1).

By section 233 of the Criminal Procedure Code, " All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution ".

Held, that the words " all statements " cover not only the prisoner's statutory unsworn statements made in terms of section 160 of the Criminal Procedure Code, but also the whole of the sworn testimony which he gave at the inquiry by virtue of the provisions of section 161. It is not open to the prosecution to read in evidence merely selected extracts from the deposition of the accused.

RULING on the admissibility of certain evidence tendered by the Crown in a trial before the Supreme Court.

T. S. Fernando, Acting Solicitor-General, with *Douglas Jansze*, *Ananda Pereira* and *Vincent Thamotheram*, Crown Counsel, for the Crown.

Colvin R. de Silva, with *T. W. Rajaratnam* and *Ananda de Silva*, for the accused.

Cur. adv. vult.

March 24, 1953. GRATIAEN J.—

In this case the prisoner is on his trial for murder. The learned Solicitor-General has invited me, before he addresses the Jury, to give a ruling upon a submission raised by the defence as to certain items of evidence on which the Crown seeks to rely as part of its case. Although it is generally regarded as undesirable to decide such questions in advance, learned Counsel agree, and I am satisfied, that this procedure would be more convenient in the present case.

After the prosecution witnesses had been examined at the non-summary inquiry held under Chapter 16 of the Criminal Procedure Code, the charge was read out to the prisoner and he was informed, under the provisions of sec. 159, of his right to give evidence if he so desired on his own behalf. The statutory caution prescribed by sec. 160 was then administered, and the prisoner made a brief statement from the dock protesting his innocence in the following words :—

" I am not guilty. "

That statement will in due course be read in evidence at this trial as required by sec. 233.

After due compliance with the provisions of sec. 160, the learned Magistrate proceeded to ask the prisoner, in terms of sec. 161 (1), whether *inter alia* he desired to give evidence on his own behalf. The prisoner elected to do so ; he gave evidence on affirmation ; he was cross-examined at some considerable length by Counsel appearing for his (then) co-accused and to a lesser extent by Crown Counsel ; and he was then re-examined. The whole of his deposition now appears as item 143 in the list of documents annexed to the indictment.

The learned Solicitor-General states that the Crown does not now desire to read in evidence the prisoner's deposition in its entirety. The Crown proposes, instead, to prove and to rely on a number of extracts selected from the deposition and containing, so it is stated, admissions which to some extent support the case for the prosecution. Dr. de Silva objects to this proposed procedure, and contends that, whether or not the prisoner elects to give evidence at the trial, it is the duty of the Crown to lead in evidence his entire deposition which was recorded by the committing Magistrate. He relies on sec. 233 of the Code which is in the following terms :—

> " All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution. "

The defence claims as of right that sec. 233 must be applied to the whole of the deposition, and it has been argued that the words " all statements " cover not only the prisoner's statutory unsworn statement made in terms of secs. 160 and 161, but also the sworn testimony which he had given at the inquiry in the exercise of the privilege conferred for the first time on accused persons when the Code was amended by sec. 8 of Ordinance

13 of 1938. The Solicitor-General submits, on the other hand, that in this context the word " statement " must be construed as having been used in contradistinction to " testimony " given on oath or affirmation.

As far as our combined researches go, there are no reported decisions of this Court or of the Court of Criminal Appeal to guide me in arriving at a decision on this point, but it has been brought to my notice that on 25th May, 1949, in S. C. No. 3/M. C. Colombo 13,273, which came up for trial at the Assizes, Windham J. ruled in precisely similar circumstances that the deposition of the prisoner recorded in the lower Court came within the ambit of sec. 233. He accordingly directed that the deposition should be read in evidence at the trial notwithstanding objection by the Crown. Unfortunately, the reasons for Windham J.'s decision are not available to me. I have also consulted one of my brother Judges who recollects that, shortly after the amending Ordinance of 1938 was enacted, Soertsz J. had given a similar ruling at the Assizes, but here again his order cannot be traced. Having given my best consideration to the problem on the footing that the question is not expressly covered by authority, I have myself come to the same conclusion.

It will be helpful to trace the historical development of Chapter 16 of the present Code since it was first enacted as Ordinance No. 15 of 1898. It originally provided that an accused person should, at the commencement of the non-summary proceedings, be informed of the nature of the charge against him, and that he should be given the opportunity at that stage of making a statutory statement—sec. 155 (1). It then imposed on the Magistrate, if a *prima facie* case of guilt had been established by the evidence for the prosecution, the duty of questioning the accused so as to enable him to explain any circumstances which had been proved against him—secs. 156 (3), 295 and 302. The accused was also permitted to call witnesses in support of his defence, but he was precluded from giving evidence at any stage of the inquiry on oath or affirmation on his own behalf—*P. C. Kalutara 7620 (1899) Koch's Reports 52.*

This part of the Code was substantially altered in many respects by Ordinance 13 of 1938. The amendments which are relevant to the present problem are to the following effect :—

(1) Section 155 (1) in its original form was repealed, and a new section was enacted requiring the Magistrate, at the commencement of the inquiry, merely to inform the accused person of the nature of the charge against him, but not to record at that stage any statement which might be made in reply thereto.

(2) The procedure of interrogation prescribed by sec. 156 (3), 295 and 302, were entirely swept away. Instead

(3) The new sections numbered 159, 160 and 161 permitted the accused, after the evidence for the prosecution had been led, to make a statutory statement under sec. 160 (1) and also, if he so desired, to give evidence on his own behalf (sec. 161).

Notwithstanding the fundamental alteration in the form of the proceedings, sec. 233 of the Code was retained in its original form. It

still requires, therefore, that " all statements " of the accused recorded in the Magistrate's Court " shall " be put in and read in evidence before the close of the case for the prosecution.

Before the Code was amended in 1938, the word " statement " in the context in which it appeared clearly had no application to statements made on oath or affirmation, because, as I have pointed out, an accused person was at that time precluded from giving evidence in his defence at the inquiry. The plurality of " statements " contemplated in the earlier procedure was at that time confined to the original statutory statement made under sec. 155 and to other statements subsequently made by the accused person under interrogation by the Magistrate.

What, then, are " all " the accused's " statements " which the Legislature had in contemplation when it altered the procedure so substantially in 1938 but nevertheless retained the imperative provisions of sec. 233 in their original form ? Admittedly, the second category of unsworn statements made under interrogation by the Magistrate has been swept away. There still remain, of course, the statutory statement (in an amended form) made under sec. 160 and the further statements made under secc. 165 in which the accused merely communicates, at the time of his commitment, the names of the witnesses whom he desires to call at the trial. Soertsz J. has suggested *obiter* in *The King v. Punchi Mahatmaya* [1] that sec. 233 also applies to any later unsworn statement which an accused person may, at a later stage of the inquiry, choose to make in order to supplement or vary his original statutory statement. With respect, I agree that although the Code makes no express provision for the recording of such statutory statements after the stage fixed by sec. 160 has passed, it is manifestly fair that statements of that kind should not be withheld from the Jury at the trial. To this extent, the rules of essential justice may legitimately be permitted to override those of strict interpretation.

The question is whether the application of sec. 233 must be limited to unsworn statements of the kind which I have previously enumerated. It must be observed in this connection that the section is obligatory, and that it contains words of the utmost generality which are sufficiently wide to cover an accused person's deposition because :

(*a*) each statement contained in the deposition cannot be said to have lost the character of a " statement " merely because of the oath or affirmation which preceded it ;

(*b*) it has been " recorded in the course of the inquiry at the Magistrate's Court " as required by the amended Code.

I can discover no logical or convincing answer to the question why the scope of these words of generality should be given a meaning so restricted as to require the compulsory reception in evidence of a prisoner's unsworn statement at the subsequent trial but to exclude altogether from the Jury statements which have the additional sanctity of the oath or affirmation which precedes it. The privilege of giving sworn evidence at

[1] *(1942) 44 N. L. R. 80.*

the Magisterial inquiry has advisedly been substituted for the earlier and less agreeable experience, whether he liked it or not, of making unsworn statements in reply to questions put to him by the interrogating Magistrate. If the latter statements were required by law to be placed before the Jury, I see no reason in principle why so illogical an intention as to exclude the former must be ascribed to the legislature.

The advantages to be derived from the comparatively recent privilege of giving evidence at the inquiry, the risks which a man necessarily undertakes in electing to exercise it, and in particular his voluntary submission to the ordeal of cross-examination before the actual trial has commenced, would be reduced to little more than a mockery if they were merely to give the Crown an opportunity :

(*a*) to discover evidence which would contradict any part of his evidence which it does not accept as true, and

(*b*) to select from the deposition certain passages containing admissions tending, if isolated from their context, to support the case for the prosecution.

I well appreciate that if an accused person does not testify on his own behalf at his trial, the reception of his earlier deposition may not strictly constitute positive proof of any exculpatory facts asserted in the document. But this argument applies with even greater force to the unsworn statements recorded under section 160 (1). In either event, the weight which the Jury may attach to any statement, sworn or unsworn, is a matter upon which they must in due course receive proper directions and assistance from the presiding Judge. In one case, for instance, a statement of either kind might well be found to militate against the defence if the Crown can disprove at the trial the truth of what the prisoner has stated to the Magistrate. In another case, the value of the defence which he ultimately puts forward at the trial might, subject to the limitations indicated in *Rex v. Naylor* [1], legitimately be regarded as weakened by his failure to disclose it on the earlier occasion. *Rex v. Littleboy* [2]. But in yet another case, the circumstance that the prisoner had, at the first opportunity provided by our procedure, voluntarily given an explanation of his conduct and persisted in it thereafter may very properly be reckoned in his favour. In other words, sec. 233 is enacted " in the interests as much of innocent persons as in the interests of justice against guilty persons "—*Rex v. Leckey* [3].

I hold that it is always the duty of the Crown to put in the whole of the prisoner's deposition in terms of sec. 233—subject, of course, to any directions which the presiding judge may give for the exclusion of any portions which are irrelevant or inadmissible. *Phipson on Evidence* (8th Ed.) 234. In the present case the prisoner desires that this procedure should be followed, but my ruling would have been the same even if he did not. I must not be understood, of course, to mean that every part of the deposition would form part of the case for the Crown. But it is material which the law requires to be placed before the jury for the purpose of arriving at their verdict in the case.

[1] *(1933) 1 K. B. 685.* [2] *(1934) 2 K. B. 408.*
[3] *(1944) K. B. 84.*

In England the prosecution, though not compelled to do so, invariably leads evidence of all statements, exculpatory or incriminatory, which the prisoner has made to a police officer after being cautioned in accordance with the Judges' Rules. That procedure cannot be adopted in this country owing to certain restrictions imposed by the provisions of our Evidence Ordinance and, perhaps, of Chapter 12 of the Criminal Procedure Code. Having regard to these restrictions, it is all the more desirable that an accused person should not be discouraged from offering, either by sworn evidence or in the form of an unsworn statement, an explanation of his conduct at the earliest point of time which the law permits under the existing procedure. And when that opportunity has been voluntarily taken, justice requires, and sec. 233 insists, that the whole of his explanation should be brought to the notice of the jury who are empanelled to try him.

Objection as to admissibility of certain evidence upheld.